Wong Kam Fung v Chin Chen Kong

HIGH COURT (KOTA KINABALU) — DIVORCE PETITION NO K-33-22 OF 2011
CHEW SOO HO J
12 JUNE 2014

Civil Procedure — Stay of execution of judgment — Special circumstances — Wife granted divorce obtained court order in husband's absence to have his legal and beneficial interests in several landed properties transferred to her absolutely — Shares in properties were husband's only assets and source of income to maintain himself and youngest son — Husband failed to act promptly to set aside/appeal order but sought stay of execution thereof to file leave to appeal out of time and/or apply to vary order — Whether husband shown special circumstances why stay should be granted — Whether court in exercise of inherent jurisdiction allowed three-month stay of execution to enable husband to apply for leave to appeal or to vary order

In granting the petitioner a divorce from the respondent, the High Court had, inter alia, ordered the respondent to pay the petitioner in cash half the value of his share in several landed properties ('the properties'). The respondent co-owned the properties with two others and the lands were used by a company in which he owned a 1/3 share. The respondent contended that it was the income he received from the company that paid his monthly contributions towards the petitioner and their children and also paid for the needs of his youngest son whom he was personally maintaining. Following the respondent's failure to strictly comply with certain maintenance orders of the court, the petitioner took out a judgment summons ('the JS') against the respondent for payment of arrears. Although served with the JS, the respondent and his counsel failed to attend court on its hearing date and, in his absence, the petitioner successfully applied, inter alia, for the respondent's legal and beneficial interest in the properties to be transferred to her absolutely ('the first order'). To give effect to the first order, the petitioner obtained another order ('the second order') for the deputy registrar/senior assistant registrar of the court to execute, on the respondent's behalf, the relevant memorandum of transfers of his share in the properties. The respondent responded by filing three applications: encl 56 to set aside the first order and encls 30 and 67 to, respectively, stay the execution of the first and second orders pending the disposal of his appeal to the Court of Appeal against the first order and his application to vary and/or rescind the same. Inter alia, the respondent argued that if the first and second orders were carried into effect he would be deprived of all his assets and source of income.

Held, dismissing encl 56, allowing encls 30 and 67 but staying the execution of the first and second orders for a period of three months only: A

(1) Enclosure 56 was defective and unmaintainable. The first order was regularly obtained and perfected and served on the respondent on 29 February 2012. His application to set it aside was made more than a year and eight months after the first order was obtained although under O 42 r 13 of the Rules of Court 2012 ('the ROC') he should have filed the application within 30 days of receiving the sealed copy of the order. The respondent did not explain the reason for the inordinate delay nor did he apply for an extension of time to make his application. He was duly served with the JS but he did not file any affidavit in opposition nor attend court on the hearing date. He could not now say the first order was defective because he was not given an opportunity to be heard. There was no question of breach of natural justice as the respondent chose to abandon his rights (see paras 9–13). B C D

(2) The record showed the respondent did not file any notice of appeal against the first order or any application to vary that order. An appeal to the Court of Appeal against the first order was more than two years out of time and there was no evidence to show the respondent had obtained leave of the Court of Appeal to appeal out of time. There was also nothing to show when the respondent would file the necessary applications in respect of the appeal or for the variation of the order; hence if encls 30 and 67 were allowed, it would be unjust to the petitioner as she would be deprived of the fruit of her judgment for an indefinite time (see paras 16–18). E F

(3) The respondent, however, had shown special circumstances why a stay of execution should be granted. If, as a result of the first and second orders the respondent, now an elderly person, would have no assets to maintain himself and his youngest son who was still studying, that would be 'special circumstances' for a stay of execution in the circumstances. Section 76 of the Law Reform (Marriage and Divorce) Act 1976, governing the division of matrimonial assets between parties to a divorce, clearly showed the Legislature never intended that all assets, whether acquired jointly or by one party or contributed to by him/her, were to be distributed solely to the wife upon divorce. The key word used in s 76 was the 'division' of assets between the parties. In exercise of the court's inherent jurisdiction under O 92 r 4 of the ROC and based on the special circumstances, a stay of the first and second orders was allowed but only for a period of three months from the date of this order. If the respondent failed to file and obtain the necessary leave to appeal and/or variation order, the order herein would lapse and have no further effect unless extended by further order of court on good and valid grounds (see paras 28 & 31). G H I

[Bahasa Malaysia summary

Dalam membenarkan pempetisyen penceraian daripada responden, Mahkamah Tinggi, antara lain, memerintahkan responden untuk membayar pempetisyen dalam tunai separuh daripada jumlah nilai sahamnya dalam beberapa hartanah ('hartanah'). Responden pemilik bersama hartanah tersebut dengan dua orang yang lain dan tanah itu digunakan oleh sebuah syarikat yang mana dia mempunyai saham sebanyak 1/3. Responden menghujahkan bahawa ia adalah pendapatan yang diterima daripada syarikat yang membayar caruman bulanan kepada pempetisyen dan anak-anak mereka dan bagi keperluan anak bongsunya yang ditanggung olehnya secara peribadi. Berikutan kegagalan responden untuk dengan ketat mematuhi perintah mahkamah berkenaan nafkah yang tertentu, pempetisyen mengeluarkan suatu saman penghakiman ('SP') terhadap responden bagi pembayaran tunggakan. Walaupun SP telah diserahkan, responden dan peguamnya gagal hadir ke mahkamah pada tarikh pendengaran dan, dalam ketidakhadirannya, pempetisyen berjaya memohon, antara lain, untuk kepentingan responden di sisi undang-undang dan benefisial dalam harta yang dipindahkan secara mutlak kepadanya ('perintah pertama'). Untuk melaksanakan perintah pertama, pempetisyen memperolehi perintah mahkamah lain ('perintah kedua') untuk timbalan pendaftar/penolong kanan pendaftar mahkamah untuk melaksanakan, bagi pihak responden, memorandum yang berkaitan dengan pemindahan akan bahagiannya dalam harta. Responden memberi maklum balas dengan memfailkan tiga permohonan: lampiran 56 untuk mengetepikan perintah pertama dan lampiran 30 dan 67 masing-masing, penangguhan pelaksanaan perintah pertama dan kedua sementara menunggu rayuannya di Mahkamah Rayuan terhadap perintah pertama dan permohonannya untuk mengubah dan/atau membatalkan yang sama. Antara lain, responden berpendapat bahawa jika perintah pertama dan kedua telah dikuatkuasakan dia akan dilucutkan daripada semua aset dan sumber pendapatannya.

Diputuskan, menolak lampiran 56, membenarkan lampiran 30 dan 67 tetapi menangguhkan pelaksanaan perintah pertama dan kedua untuk tempoh tiga bulan sahaja:

(1) Lampiran 56 adalah cacat dan tidak boleh dikekalkan. Perintah pertama secara tetap diperolehi dan disempurnakan dan disampaikan kepada responden pada 29 Februari 2012. Permohonannya untuk mengetepikannya telah dibuat lebih daripada satu tahun dan lapan bulan selepas perintah pertama telah diperolehi walaupun di bawah A 42 k 13 Kaedah-Kaedah Mahkamah 2012 ('KKM') dia sepatutnya memfailkan permohonan dalam tempoh 30 hari selepas menerima salinan bermeterai perintah itu. Responden tidak menjelaskan sebab bagi kelewatan melampau dia juga tidak memohon lanjutan masa untuk membuat permohonannya. Dia telah disampaikan dengan sempurna dengan SP tetapi dia tidak memfailkan apa-apa afidavit menentang mahupun hadir

ke mahkamah pada tarikh perbicaraan. Dia tidak boleh sekarang mengatakan perintah pertama adalah cacat kerana dia tidak diberi peluang untuk didengar. Tidak ada persoalan melanggar keadilan asasi sebagai responden memilih untuk meninggalkan haknya (lihat perenggan 9–13).

(2) Rekod itu menunjukkan responden tidak memfailkan apa-apa notis rayuan terhadap perintah pertama atau apa-apa permohonan untuk mengubah perintah itu. Rayuan kepada Mahkamah Rayuan terhadap perintah pertama adalah lebih daripada dua tahun selepas tamat tempoh dan tidak ada keterangan menunjukkan responden telah mendapat kebenaran Mahkamah Rayuan untuk merayu daripada masa. Tiada juga apa-apa untuk menunjukkan apabila responden akan memfailkan permohonan berkenaan dengan rayuan itu atau bagi pengubahan perintah itu; oleh itu jika lampiran 30 dan 67 dibenarkan, ia tidak adil kepada pempetisyen kerana dia akan dilucutkan keputusan penghakimannya untuk waktu yang tidak dapat ditentukan (lihat perenggan 16–18).

(3) Responden, walau bagaimanapun, telah menunjukkan keadaan tertentu mengapa penangguhan pelaksanaan itu patut diberikan. Jika, akibat daripada perintah yang pertama dan kedua responden, kini orang yang tua, tidak mempunyai aset untuk menyara dirinya dan anak bongsunya yang masih belajar, ia menjadi 'special circumstances' untuk penggantungan pelaksanaan dalam hal keadaan itu. Seksyen 76 Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976, yang mengawal pembahagian harta sepencarian antara pihak-pihak dalam perceraian, jelas menunjukkan Badan Perundangan tidak pernah memaksudkan bahawa semua aset, sama ada yang diperolehi secara bersama atau oleh satu pihak atau disumbangkan oleh suami/isteri, diagihkan sepenuhnya kepada isteri jika berlaku penceraian. Perkataan utama yang digunakan dalam s 76 adalah 'division' aset antara pihak-pihak. Pada menjalankan bidang kuasa sedia ada mahkamah di bawah A 92 k 4 KKM dan berdasarkan hal keadaan khas, penggantungan perintah pertama dan kedua telah dibenarkan tetapi hanya untuk tempoh tiga bulan dari tarikh perintah itu. Jika responden gagal untuk memfailkan dan mendapatkan kebenaran yang diperlukan untuk membuat rayuan dan/atau perintah variasi, perintah di dalam ini akan luput dan tidak mempunyai kesan melainkan jika dilanjutkan lagi dengan perintah selanjutnya daripada mahkamah atas alasan yang wajar dan sah (lihat perenggan 28 & 31).]]]

Notes

For cases on special circumstances, see 2(4) *Mallal's Digest* (5th Ed, 2015) paras 8489–8500.

Cases referred to

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393; [1998] 2 CLJ 75, FC (refd)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281, CA (refd)
Takako Sakao (f) v Ng Pek Yuen (f) & Anor (No 2) [2010] 2 MLJ 181; [2010] 1 CLJ 381, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 50(2), 51(1)
Law Reform (Marriage and Divorce) Act 1976 ss 76, (1), (2), (3), (4)
Rules of Court 2012 O 1A, O 3 r 5(1), (2), O 42 r 13, O 52, O 52 r 2B, O 92 r 4

Joan Goh Penn Nee (Goh & Assoc) for the respondent.
Shireen Leandra Sikayun (Lee & Thong) for the petitioner.

Chew Soo Ho J:

INTRODUCTION

[1] Enclosures 30, 56 and 67 are filed by respondent while encl 36 is filed by Chong Fook Chuan, Ngui Kwan Yii and Fheng Kong Plantations Sdn Bhd as proposed interveners.

[2] In encl 30, respondent applies, inter alia, for all executions relating to the order of court dated 6 January 2012 ('the first order') made by Justice Dato Abdul Rahman Sebli at High Court Kota Kinabalu and any proceedings taken by the petitioner be stayed pending the disposal of the respondent's appeal thereof to the Court of Appeal and the respondent's application to vary and/or rescind the said order and costs.

[3] In encl 56, respondent applies, inter alia, for the said order of court dated 6 January 2012 be set aside and costs.

[4] In encl 67, respondent applies, inter alia, for all executions of the order of court dated 17 October 2013 ('the second order') at High Court Kota Kinabalu and/or any proceedings taken by the petitioner be stayed pending the disposal of the respondent's appeal to the Court of Appeal and the respondent's application to vary and/or rescind the order of court dated 6 January 2012 and costs which is encl 30 above.

BRIEF FACTS

[5] Petitioner had initiated a divorce proceeding against the respondent and a date of hearing was scheduled after the petition had been duly served. respondent applied in the meantime to strike out the divorce petition on the date of the hearing of the divorce on 8 April 2011 which was however dismissed by the court. The court had also refused to grant further time for the respondent to file his objections against the divorce petition. Henceforth, order for the dissolution of marriage with decree nisi and order for the ancillary matters prayed for were then granted by the court on the same date of 8 April 2011. Decree nisi was made absolute on 13 July 2011. On the respondent's failure to realise the said judgment after decree nisi had been made absolute, petitioner subsequently filed a request for the issuance of a judgment summons supported by the judgment creditor's affidavit on 9 December 2011 in respect of the order granting the decree nisi and the ancillary matters as follows:

(a) that the respondent shall provide a sum of RM500,000 to the petitioner to enable the petitioner to purchase her own residential property, which residential property shall be given to the four children of the marriage in equal shares upon the demise of the petitioner;

(b) that the respondent shall provide a sum of RM60,000 to the petitioner to enable the petitioner to purchase her own vehicle;

(c) that the respondent shall pay a lump sum of RM500,000 to the petitioner towards her maintenance for life;

(d) that the following matrimonial assets be valued by a qualified valuer to be agreed by the parties and that after deduction of the redemption sum (if any or where applicable) in relation thereto, the petitioner be awarded one half of the value in cash:

(i) whole share of Country Lease 115351445;

(ii) 1/3 share of Town Lease 117505503;

(iii) 1/3 share of Town Lease 117509038;

(iv) 1/3 share of Town Lease 117509636;

(v) 1/3 share of Country Lease 115330188;

(vi) 1/2 share of Country Lease 115293662;

(vii) 1/3 share of Country Lease 115430861;

(viii) 1/3 share of Country Lease 115430905;

(ix) 1/3 share of Country Lease 115433737;

(x) 1/3 share of Country Lease 115433728;

(xi) 1/3 share of Country Lease 115360864; and

(xii) 1/3 share of Country Lease 115360873.

(e) that the respondent be ordered to pay interest at the rate of 2% or the prevailing rate for fixed deposits whichever is higher, on the total value to be awarded to the petitioner in respect of item (d) hereinabove calculated from the date of judgment to the date of full payment;

(f) liberty to apply for consequential orders for the carrying of such orders in respect thereof; and

(g) that the respondent be ordered to pay the costs of this suit.

[6] Save for a sum of RM100,000 received, the petitioner took out the judgment summons for the arrears of RM1,062,000 against the respondent. It was duly served on 15 December 2011 on the respondent vide affidavit of service, encl 14. The judgment summons was scheduled for hearing on 6 January 2012. The respondent and/or his counsel did not attend court. Learned counsel for the petitioner then applied for the respondent's interest in the 12 properties in the aforesaid order made when granting the decree nisi in the first instance be transferred to the petitioner in view of the respondent's blatant disregard of the order of the court. In addition, an order of committal was also applied against the respondent but was to be suspended pending the said transfer of the said 12 properties by the respondent to the petitioner which was to be executed within one month from the date of hearing, 6 January 2012, the oral application was granted on 6 January 2012.

[7] Upon further application by the petitioner vide encl 18 to lift the suspension of the order of committal against the respondent who had failed to comply with the order of court dated 6 January 2012 above, the court allowed the application on 3 May 2013 whereupon on 22 May 2013, the respondent was brought before the court and was ordered to be imprisoned for 30 days for contempt of court on account of his failure to comply with the orders of the court when he was not prepared to purge the contempt by executing the transfer. Vide a notice of application dated 19 June 2013 (encl 27), the petitioner applied for the deputy registrar/senior assistant registrar of the High Court to sign the memorandum of transfers for the 12 properties as earlier ordered on behalf of the respondent in favour of the petitioner and that such transfers are to be effected by the land office accordingly. This application was

allowed on 17 October 2013 with costs of RM3,000.

FINDINGS OF COURT

[8] To recapitulate, encl 30 and encl 67 filed by the respondent seek to apply to stay all executions of the first order dated 6 January 2012 as well as to stay all executions of the second order dated 17 October 2012 pending the disposal of the respondent's appeal to the Court of Appeal and pending disposal of respondent's application for variation of the order, inter alia, while vide encl 56, respondent is applying to set aside the first order dated 6 January 2012. In view of the fact that encl 56 being an application to set aside the first order upon which the other actions were taken by the petitioner and its disposal will directly affect the other two applications in the sense that if the setting aside is allowed, it may render the other applications academic, I shall first deal with encl 56 before encls 30 and 67.

Enclosure 56

[9] It must first be noted that encl 56 seeks to set aside the first order made on 6 January 2012 which is a perfected order which was regularly obtained with proper service of the petition on the respondent. Enclosure 56 was only applied on 27 September 2013 which was more than one year eight months thereafter. Under O 42 r 13 of the Rules of Court 2012, a party intending to set aside such order shall make an application within 30 days after the receipt of the order by him. respondent alleged that the sealed first order was never served on him. However, from exh WKF1 annexed to the petitioner's affidavit in opposition (encl 58), petitioner's then solicitor's letter dated 27 February 2012 which enclosed a copy of the said sealed order by way of service on the respondent and courier service showing acknowledgement of the same on 29 February 2012 showed that there had been due service of the said perfected order on the respondent. Hence, the respondent ought to have applied for extension of time to make this application as O 42 r 13 of the Rules of Court 2012 is a mandatory provision that an application to set aside shall be made within 30 days after receipt of the sealed copy of the first order but no such prayer was sought by the respondent.

[10] After the first order had been made, several proceedings were taken up by the petitioner to enforce the first order but no action was taken to apply to set aside this first order; there is also no explanation as to why the respondent

took more than one year eight months to file encl 56 to enable this court to consider whether time should be abridged or extended pursuant to O 3 r 5(1) and (2) of the Rules of Court 2012 or that the court shall exercise such discretion to satisfy the overriding justice under O 1A of the Rules of Court 2012. In the absence of a plausible explanation, there seem no grounds or basis for this court to consider an extension.

[11] In addition, despite petitioner having raised her objection based on O 42 r 13, respondent does not deem fit to amend encl 56 to include the prayer for extension or abridgement of time. The court cannot make an order in favour of the respondent when he does not wish to apply for. Therefore, encl 56 is defective and not maintainable without the respondent applying in the first place for an order for extension of time to file this application which was made more than one year eight months after the said first order was served on the respondent.

[12] The unexplained inordinate delay of more than one year eight months does not justify this court to consider a setting aside application for reason that injustice would be caused more to the petitioner since various subsequent proceedings had taken place arising from this first order. There is no apparent reason why no such application was made within the stipulated time frame.

[13] The respondent seems to contend in submission that he was not accorded the opportunity to be heard because he was not present in court on 6 January 2012. The fact however is that the respondent was duly served with the judgment summons ('JS') but had abstained from attending the hearing of the JS without cause to voice his objection. He also did not file any affidavit in opposition. In short, there was no rebuttal evidence vide affidavit from respondent and he must be deemed to have accepted the petitioner's affidavit evidence; see *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281. Thus, it is untenable and unsustainable to argue that the respondent was not given an opportunity to be heard when he himself did not wish to attend court to be heard of his objections, if any. By declining to appear in court to defend his right, respondent had indirectly abandoned his defence against the JS and cannot now be heard to allege that the first order is defective and ought to be set aside on ground that he was not given that opportunity to be heard which was due to his own default as he himself had abandoned his rights. The right to be heard or the principle of nature justice of *audi alteram partem* cannot be said to have been breached when one has intentionally declined to voice his case or to

attend court to defend his right. Two consequences would follow when the respondent who was fully conversant with the facts of the case studiously refrained from giving evidence: firstly, the evidence given by the petitioner ought to have been presumed to be true and the judge was under a duty to accept the petitioner's evidence as true in the absence of any evidence from the respondent going the other way; secondly, the court ought to have drawn an adverse inference against the respondent: *Takako Sakao (f) v Ng Pek Yuen (f) & Anor (No 2)* [2010] 2 MLJ 181; [2010] 1 CLJ 381 (FC). By respondent's failure to attend court on the hearing of the JS, it ought to be assumed that respondent had accepted that the sum accrued from his failure to make the payment to the petitioner was true and that he had not complied with the earlier judgment of the court to divest Y2 of his share in those properties listed, to the petitioner upon sale value as ordered. Even though it may be premature to impose a committal order (O 52 of the Rules of Court 2012) it was nevertheless a conditional order to ensure compliance of the transfer of the listed properties in compliance with the judgment; failure to comply of which would attract a committal order for contempt of court. Since the order was conditional, the right of being heard would not be defeated as respondent would certainly be heard before he is to be so committed through a formal notice to show cause (O 52 r 2B). In the circumstances, I am of the view that there is no question of any breach of nature justice and respondent has also failed to show in whatever way that there is clear contravention of any written law, illegality or lack of jurisdiction as stipulated as special exception in *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393; [1998] 2 CLJ 75 (FC) to clothe this court with the jurisdiction to set aside a final order regularly obtained from another High Court of concurrent jurisdiction. If at all the respondent was not satisfied with the first order, he should have appealed. I am not convinced of any injustice when respondent had chosen to waive his right.

[14] For the reasons as advanced above, encl 56 is accordingly dismissed.

Enclosures 30 and 67

[15] Vide both these enclosures, respondent is seeking to stay all executions of the first order and any proceedings taken by the petitioner and the second order respectively pending the disposal of the respondent's appeal to the Court of Appeal and the respondent's application to vary and/or rescind the first order (but not the second order) and costs.

[16] From the CMS records of this case, it is noted that no notice of appeal had been filed by the respondent against the first order since or soon after it was made nor any application for variation of the orders made in respect of the first order. Any appeal to the court now is glaringly out of time (s 51(1) of the Courts of Judicature Act 1964) and leave ought to have been obtained from the Court of Appeal pursuant to s 50(2) of the Courts of Judicature Act 1964 before an appeal out of time can be filed. No evidence of such leave to appeal was tendered to show that leave has been obtained from the Court of Appeal. Provided that the respondent could obtain leave to appeal after a lapse of more than two years now after the decision of the first order, it would appear to be fruitless for this court to make an order to stay the executions of the first order pending appeal when no appeal had been filed coupled with the fact that the respondent did not indicate when he would make the application for leave and extension or abridgement of time to appeal. If leave to appeal is presumably refused, an order to stay execution pending appeal is an order in vain for which I believe no court shall make such an order. If leave is otherwise granted, respondent is at liberty to apply by which time an order for stay of execution pending appeal if granted would be an effective and enforceable order of court.

[17] In respect of the alleged respondent's application to vary the first order, similarly, no such application has been filed vide the records of this case nor did the respondent affirm as to when he would file this alleged application. There is no question of a rescission of this first order since encl 56 above which seeks to set aside the first order would render res judicata any application to rescind the first order. It is therefore inappropriate for this court to consider making an order for a stay of execution pending 'no application to vary the first order' which will similarly be an order in vain.

[18] Moreover, if this court were to make the order as prayed with no certainty as to when the respondent is going to file his application for leave to appeal against the first order and/or his application to vary the first order and/or the second order, it would be unjust to the petitioner as she would be indirectly deprived of the fruit of the judgment of the court for indefinite time.

[19] On this ground, both these applications under encls 30 and 67 without the leave to appeal and without the application to vary the court order, prima facie, cannot be maintained and they can be struck out but with liberty to re-apply.

[20] However, I shall consider whether respondent had raised any special circumstances to justify his applications for stay of execution of both the first order and the second order respectively and whether justice of the case dictates a stay of execution despite what I have deliberated above pursuant to the inherent jurisdiction of the court under O 92 r 4 of the Rules of Court 2012.

[21] Briefly, the respondent averred that out of the 12 landed properties in the first order and second order of court, properties CL 115430861 and CL 115430905 are charged to Alliance Bank Bhd wherein any transfer of these two lands would affect the loans while CL 115293662 is not a matrimonial asset since this land was inherited from respondent's late father. The remaining of the other lands are co-owned by the respondent with two others. It was averred further that these lands are used by Fheng Kong Plantations Sdn Bhd in which the respondent said he owned 1/3 of this company from where he received an income of about RM100,000 per year. If the ownership of all the said lands of the respondent are transferred to the petitioner, respondent alleged that he would be stripped off completely of all his assets as well as all his incomes derived from Fheng Kong Plantations.

[22] From his income received from Fheng Kong Plantations, respondent stated that he had been making monthly contribution to the petitioner through her personal accounts and their children's account in the sum ranging between RM6,900 to RM70,000 per month (exh CCK7 to encl 30) and has been continuously paying RM8,000 per month to the petitioner which was not denied by the petitioner but she had allegedly failed to reveal the same to the court. In additional, respondent said that he has still to support his young son who is still studying and who requires care and support from respondent in term of school fees and monthly expenses. It is therefore submitted for the respondent that if execution is not stayed, the respondent will be out of pocket and there will be no one to support his youngest son. As to the two properties charged to the bank, respondent submitted that the change of ownership may result in the existing loan facilities to be recalled which will affect the rights of the other co-owners of the said lands including personal guarantees.

[23] In reply, petitioner submitted that in respect of the aforesaid two CL lands charged as security to the bank and the CL land allegedly inherited by the respondent, it is the duty of the respondent to highlight to the court during the divorce proceedings and raise his objection then so that these properties would not have been included as part of the terms of the divorce. The petitioner contended that it is too late for respondent to raise his objection at this stage. Referring to the payment of maintenance and others, petitioner accounted the receipt of RM100,000 had been made by the respondent but not any other payments when the judgment summons was taken out to recover the arrears of RM1,062,000 from the respondent.

[24] From the initial order of court dated 8 April 2011 upon decree nisi being granted (exh CCK2), the court ordered the 12 landed matrimonial assets of whole share in respect of CL 115351445 and 1/3 share of the remaining 11 pieces of the lands to be valued by a qualified valuer to be agreed by the parties and that after deduction of the redemption sum (if any or where applicable) in

relation thereto, the petitioner be awarded 1/4 of the value in cash. In the first order dated 6 January 2012, the learned judge had ordered that an order of commitment be made against the respondent but the execution of which is suspended on terms that the respondent within one month therefrom transferred his legal and beneficial interest in the 12 landed matrimonial assets to the petitioner absolutely.

[25] The second order dated 17 October 2013 was made to merely enforce the first order which the respondent did not appeal or seek to vary that the transfer can be executed by the deputy registrar of the High Court on behalf of the respondent if the respondent continued to refuse to comply with the first order to transfer the said lands to the petitioner as ordered. All along the respondent did not seem to care or be concerned with any orders made by the court since the order of decree nisi dated 8 April 2011 followed by the first order and the second order until now that he realised that he might be allegedly stripped off even his income from Fheng Kong Plantations Sdn Bhd which used the said lands. All these alleged circumstances are the cause of his own frolic and indifferent attitude towards the orders of court. Strictly speaking, respondent has he himself to blame.

[26] Having said the above, is it the intention of the legislation that upon divorce that a husband is to be reduced to a straw with all his matrimonial assets stripped off in favour of the wife? Section 76 of the Law Reform (Marriage and Divorce) Act 1976 provides, inter alia, that for assets acquired by both parties during the marriage by their joint efforts, the court shall have the power to order the division between the parties (s 76(1)).

Sub-section (2) to section 76 states:

> (2) In exercising the power conferred by subsection (1) the court shall have regard to:
>
> (a) the extend of the contributions made by each party in money, property or work towards the acquiring of the assets;
>
> (b) any debts owing by either party which were contracted for their joint benefit;
>
> (c) the needs of the minor children, if any, of the marriage
>
> and subject to those considerations, the court shall incline towards equality of division.

[27] If the assets were acquired during marriage by the sole effort of one party to the marriage, the court in exercising its power to order division between the parties shall have regard to (a) the extent of the contribution made by the other party who did not acquire the assets to the welfare of the family by looking after the home or caring the family; (b) the needs of the minor

children, if any, of the marriage; and the court may divide the assets as it thinks reasonable but the party by whose effort the assets were acquired shall receive a greater proportion, (s 76(3) and (4))

[28] Section 76 of the Law Reform (Marriage and Divorce) Act 1976 is the sole provision which governs the division of matrimonial assets between the parties upon a divorce. Reading s 76 in its entirely, it appears amply clear that the Legislature has never intended that all the assets whether acquired jointly or by one party or contributed to by him/her are to be distributed to the wife solely upon divorce. The key word used in s 76 is the 'division' of the assets between the parties. If it is true that as a consequence of the said orders that the respondent who is now an elderly person would have no assets to maintain himself and his youngest son who is still studying, I would think that this is special circumstances for a stay of execution in the circumstances.

[29] As to the two properties being charged to the bank and the rights of the other co-owners, I am inclined to agree with the petitioner's submission that they are not special circumstances as the dispute is between the petitioner and the respondent arising from their divorce and the properties are confined to the shares of the respondent in the said lands.

[30] To reiterate, it appears that the respondent has not shown that he had applied to the Court of Appeal for leave to appeal nor had he applied to vary the first order. Any stay of execution must not be misappropriated to serve as a restraining order to defeat or delay the right of the petitioner to enjoy the judgment or orders made in her favour. This may be so if after obtaining an order of stay, the respondent may not or may delay to make his applications for leave to appeal or to vary the order which will mean that the petitioner cannot proceed to enforce the order of court as long as the respondent does not file the necessary applications. In such case, injustice will occasion to the petitioner for which this court cannot condone.

[31] For the foregoing reasons and in the interest of justice, despite what I have found above except for the special circumstances, I allow the stay of execution of the first order and second order vide encls 30 and 67 respectively but for a period of three months from the date of this order hereunder. Should the respondent fail to file and obtain the necessary leave to appeal and/or variation order, this order shall lapse and shall have no further effect unless extended by further order of court on good and valid grounds.

[32] Costs (one single cost) for all three encls 30, 56 and 67 is awarded in the sum of RM5,000 to the petitioner as the cause of delay is by the respondent.

Enclosure 56 dismissed, encls 30 and 67 allowed but execution of the first and second orders stayed for a period of three months only.

Reported by Ashok Kumar